NO. 47368-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

FAUZI BIN ZAIN,

Appellant.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

1. The Failure to Register as a Sex Offender statute is not unconstitutional.

2. There was sufficient evidence to convict Zain.

3. The trial court did not violate Smith's rights by allowing one of his hands to remain cuffed.

4. Smith's counsel was effective.

II. STATEMENT OF THE CASE

A. Procedural History.

On May 20, 2014, Fauzi Bin Zain was charged by information with Failure to Register as a Sex Offender, RCW 9A.44.130(1), 4(a), 4(b), 5(a), 5(b) and RCW 9A.44.132(1)(b). CP 5. On July 17, 2014, Zain waived his right to a jury trial, and stipulated that he had previously been convicted of a sex offense and two prior failures to register as a sex offender. RP 1, CP 4-5, 10,14. On July 24, 2014, Zain was convicted as charged at a bench trial. RP 4-70. On July 31, 2014, Zain was sentenced within the standard range. RP 75, CP 17.

B. Factual History

On January 16, 2014, Fauzi Bin Zain, having been released from custody, registered as a sex offender at the Cowlitz County Sheriff's

Office, Sex Offender Unit. He listed his address as 1316 11th Ave, Apt 3, Longview, WA. RP 11. According to Kris Taff, the clerk that handles the sex offender registrations, Zain did not submit a new change of address form. RP 11.

The Department of Corrections provided Zain with a three month voucher for housing. RP 16, 51-52. Brian Weathers, Manager of Hudson Hotel Annex testified that Zain's Department of Corrections voucher ran out on April 16, 2014. Weathers tried to contact Zain by going to the room a couple of times and by calling him. Five days later, on April 21st, Weathers, with the help of Zain's roommate Benjamin Held, packed up Zain's belongings, changed the locks, and checked him out of the hotel. RP 17, 20. Weathers explained that "because it is a hotel, if somebody's late I generally give them the courtesy, although you don't have to because it's a hotel, I give then the courtesy of trying to contact them and – uh – once I cannot do that, since it's not an apartment I don't have to evict, I just remove their belongings." RP 15. Once a person's belongs are removed, he keeps them for no less than thirty days and changes the locks. RP 15-16.

Weathers testified that he removed one blue Tupperware tub and a couple bags and that it was not very much stuff. No one ever came to

collect his belongings. RP 18. After April 21, Benjamin Held paid increased rent to rent the room as a single. RP 22.

On April 17, Community Corrections Officer Terry Mathers when to the Hudson Hotel looking for Zain and met with his former roommate, Benjamin Held. RP 29. He was also unable to reach him by phone that day, but left him a message tell him to call by four pm. RP 31. Zain did not contact Officer Mathers. On the early morning of April 21, 2014, Officer Mathers returned to the Hudson Hotel Annex and could not locate Zain. Officer Mathers also left him around one or two messages requesting a return call. On April 23, Zain called Officer Mathers and asked if there was a warrant issued for him. Officer Mathers called him back and left him a message that there was a warrant. RP 32-33. He did not receive another message from the Defendant. Zain testified that his number has remained unchanged since his release from prison. RP 54. On April 28th, 2014, Officer Mathers learned that Zain was in the Lewis County Jail. RP 33. Zain testified that he was arrested on the DOC warrant when he was in Lewis County on April 28, 2014. RP 35,52.

On Thursday, April 24, 2014, Olga Lozano, a civilian investigator with the Longview Police Department, went to the Hudson Hotel to verify Zain's address and could not locate him. RP 38-39.

III. ARGUMENT

A. THE FAILURE TO REGISTER AS A SEX OFFENDER STATUTE IS NOT UNCONSTITUTIONAL

The constitutionality of a statute is reviewed de novo. *City of Spokane v. Neff*, 152 Wn.2d 85, 88, 93 P.3d 158 (2004). A reviewing court "will presume that a statute is constitutional and it will make every presumption in favor of constitutionality where the statute's purpose is to promote safety and welfare, and the statute bears a reasonable and substantial relationship to that purpose." *State v. Glas*, 147 Wn.2d 410, 422, 54 P.3d 147 (2002); *State v. Lee*, 135 Wn.2d 369, 390, 957 P.2d 741 (1998). "If possible, a statute must be interpreted in a manner that upholds its constitutionality." *State v. Halstein*, 122 Wn.2d 109, 123, 857 P.2d 270 (1993) (*following Tacoma v. Luvene*, 118 Wn.2d 826, 841, 827 P.2d 1374 (1992), *State v. Dixon*, 78 Wn.2d 796, 804, 479 P.2d 931 (1971)).

"A statute is overbroad if it sweeps constitutionally protected free speech within its prohibitions and there is no way to sever its unconstitutional applications." *Lee*, 135 Wn.2d at 387 (*following State v. Talley*, 122 Wn.2d 192, 210, 858 P.2d 117 (1993), *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989)). Where a court finds that a statute is unconstitutional "as applied," the statute cannot be applied again

under similar circumstances. *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). If a court finds a statute facially unconstitutional, the statue must be struck down. *Id.* However, if there are circumstances in which a statute can be constitutionally applied, a facial challenge must be rejected. *Id.*

If a fundamental right is at issue, the State must have a compelling interest to justify the statute that limits this right. *State v. Schimelpfenig*, 128 Wn. App. 224, 226, 115 P.3d 338 (2005). The right to travel is a fundamental right and subject to strict scrutiny. *Kent v. Dulles*, 357 U.S. 116, 78 S.Ct. 1113, 2 L.3d.2d 1204 (1958); *City of Seattle v. McConahy*, 86 Wn. App. 557, 571, 937 P.2d 1113, *review denied*, 113 Wn.2d 1018, 948 P.2d 338 (1997). "A state law implicates the right to travel when it *actually* deters such travel and where impeding travel *is its primary objective*." *State v. Enquist*, 163 Wn. App. 41, 256 P.3d 1277 (2011), *review denied*, 173 Wn.2d 1008 (2012) (*emphasis added*).

In the present matter, Zain's contention that RCW 9A.44.130 is unconstitutionally overbroad is without merit. Zain cannot demonstrate beyond a reasonable doubt that RCW 9A.44.130 is facially invalid or unconstitutional "as applied." First, despite Zain's argument, and as previously recognized by the courts, the State does have a compelling interest that justifies the statute. "The statute was enacted to 'assist local

law enforcement agencies' efforts to protect their communities by regulating sex offenders.'" *Enquist*, 163 Wn. App. at 51 (*quoting* Laws of 1990 ch. 3, § 401). "Impeding travel *has never* been RCW 9A.44.130's primary goal." *Id.* (*emphasis added*).

Furthermore, the failure to register as a sex offender statute does not contain any provisions that intend the impediment or restriction of travel. Likewise, the statute does not actually prevent Zain from traveling. Zain is not prohibited from moving his residence, nor is he prohibited from moving to a different city, county, or state. "The statute...permits a registrant to travel or move out of the state for work or educational purposes, if he...timely registers with the new state and notifies the sheriff of the last Washington county in which he registered." *Id.*

Zain claims that he cannot be away from his primary residence for more than three days. *Petitioner's Brief* at 8. This is an unfounded legal conclusion contrary to the prevailing case law. "A residence 'is the place where a person lives as either a temporary or permanent dwelling, a place to which one intends to return, as distinguished from a place of temporary sojourn or transient visit.'" *State v. Pickett,* 95 Wn. App. 475, 478, 975 P.2d 584 (1999). Smith can maintain a residence *and* travel to another location. For example, under the above definition of "residence," Zain could travel to Spokane for four weeks as long as he intends on returning

to his residence. He is not required to re-register when he goes on vacation. He has no duty to notify law enforcement when he travels. RCW 9A.44.130 requires him to register only when he changes his primary residence or ceases to have a fixed residence. Zain fails to provide any evidence that RCW 9A.44.130 restricts his ability to travel.

B. THERE WAS SUFFICIENT EVIDENCE TO CONVICT ZAIN.

The test for reviewing a defendant's challenge to the sufficiency of evidence in a criminal case is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." *State v. Gentry,* 125 Wn.2d 570, 596–97, 888 P.2d 1105 (1995). All reasonable inferences from the evidence are drawn in favor of the State. *Id.* at 597. The elements of a crime can be established by both direct and circumstantial evidence. *State v. Thompson,* 88 Wn.2d 13, 16, 558 P.2d 202 (1977).

The State had sufficient evidence to show that Zain had failed to register as a sex offender as he was not living where he had registered and had not changed his address with the Cowlitz County Sheriff's Office.

On January 16, 2014, Fauzi Bin Zain, having been released from custody, registered as a sex offender at the Cowlitz County Sheriff's

Office, Sex Offender Unit. He listed his address as 1316 11th Ave, Apt 3, Longview, WA. RP 11. According to Kris Taff, the sex offender registration clerk, Zain did not submit a new change of address form when he moved in April. RP 11.

The Department of Corrections provided Zain with a three month voucher for housing. RP 16, 51-52. Brian Weathers, Manager of Hudson Hotel Annex, testified that Zain's Department of Corrections voucher ran out on April 16, 2014. Zain testified he was given a three month voucher and moved to the hotel January 16, 2014. RP 51, 54. Weathers tried to contact Zain by going to the room a couple of times and by calling him. Five days later, on April 21st, Weathers, with the help of Zain's roommate Benjamin Held, packed up Zain's belongings, changed the locks, and checked him out of the hotel. RP 17, 20. Because Zain was staying at a hotel, Weather did not need to legally evict Zain. RP 15.

Weathers testified that he removed one blue Tupperware tub and a couple bags from Zain's room and changed the locks. No one, including Zain, came to collect his belongings. RP 15-18. After April 21, Benjamin Held began to rent the room as a single. RP 22.

On April 17, Community Corrections Officer Terry Mathers went to the Hudson Hotel looking for Zain and met with his former roommate, Benjamin Held. RP 29. Officer Mathers attempted to reach Zain by phone

that day, but left him a message telling him to call by four pm. RP 31. Zain did not contact Officer Mathers. On the early morning of April 21, 2014, Officer Mathers returned to the Hudson Hotel Annex and again Zain was not there. Officer Mathers left him around one or two messages requesting a return call. On April 23, Zain called Officer Mathers and asked if there was a warrant issued for his arrest. Officer Mathers called him back and left him a message that there was a warrant. RP 32-33. He did not receive another message from the Defendant. Zain testified that his number has remained unchanged since his release from prison. RP 54. On April 28th, 2014, Officer Mathers learned that Zain was in the Lewis County Jail. RP 33. Zain testified that he was arrested on the DOC warrant when he was in Lewis County on April 28, 2014. RP 35,52.

On Thursday, April 24, 2014, Olga Lozano, a civilian investigator with the Longview Police Department, went to the Hudson Hotel to verify Zain's address and could not locate him. RP 38-39.

After repeated attempts by Weathers, Investigator Lozano, and Officer Mathers, Zain was never located at the hotel room. The evidence presented at trial proved that Zain's rent was only paid through April 16th and that Zain was "evicted" on April 21 and had no lawful basis inhabit the room. In fact, another tenant began to pay for the room as a single, and Zain never returned to the Hotel to collect his belongings. In fact, when

Zain was asked at trial if he had been to the Hudson Hotel Annex between April 10th and 28th, Zain responded "uh – I'd been by there." RP 52. When viewed in a light most favorable to the State, there was sufficient evidence presented to show Zain had failed to register as a sex offender having moved from the Hudson Hotel.

C. THE TRIAL COURT DID NOT VIOLATE ZAIN'S RIGHTS BY ALLOWING ONE OF HIS HANDS TO REMAIN CUFFED.

Because Zain cannot show that his cuffed hand had a substantial effect on the trial judge, reversal is not merited. "A criminal defendant is 'entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances.'" State v. E.J.Y., 113 Wn. App. 940, 951, 55 P.3d 673 (2002) citing *State v. Turner,* 143 Wn.2d 715, 725, 23 P.3d 499 (2001) (quoting *State v. Finch,* 137 Wn.2d 792, 842, 975 P.2d 967 (1999)). "Restraints are viewed with disfavor because they may abridge important constitutional rights...." *State v. Hartzog*, 96 Wn.2d 383, 398, 635 P.2d 694 (1981). In cases involving potential misconduct by a criminal defendant, the "trial judge must exercise discretion in determining the extent to which courtroom security measures are necessary to maintain order and prevent injury. That discretion must be founded upon a factual basis set forth in the record." *Hartzog,* 96 Wn.2d at

400, 635 P.2d 694. *Hartzog* lists several factors to be considered when determining if a defendant should be restrained during trial:

> "[T]he seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies."

State v. Hutchinson, 135 Wn.2d 863, 887-888, 959 P.2d 1061 (1998), *cert. denied,* 525 U.S. 1157, 119 S.Ct. 1065, 143 L.Ed.2d 69 (1999) citing *State v. Hartzog,* 96 Wn.2d 383, 400, 635 P.2d 694 (1981).

"A claim of unconstitutional shackling is subject to harmless error analysis. In order to succeed on his claim, the Defendant must show the shackling had a substantial or injurious effect or influence on the jury's verdict. Because the jury never saw the Defendant in shackles, he cannot show prejudice." *Id.* at 888 *citing Rhoden v. Rowland,* 10 F.3d 1457, 1459–60 (9th Cir.1993).

The absence of a showing of a factual basis on the record does not require reversal unless it is shown that the use of restraints substantially

affected the trial court's fact finding. *State v. Hutchinson,* 135 Wn.2d 863, 888, 959 P.2d 1061 (1998), *cert. denied,* 525 U.S. 1157, 119 S.Ct. 1065, 143 L.Ed.2d 69 (1999).

In *State v. E.J.Y.*, the defendant was charged with felony harassment and was tried before a judge. At trial, E.J.Y.'s attorney notified the court that E.J.Y. was being restrained by both leg and arm shackles. *State v. E.J.Y.*, 113 Wn. App. 940, 944, 55 P.3d 673 (2002). The trial judge then asked two detention officers, in unsworn testimony, to explain the reason E.J.Y. had been brought to court in shackles. They explained to the court that an incident had occurred approximately three weeks earlier when E.J.Y. had bitten a staff person and attempted to escape out of a car. *Id.* at 945.

The trial judge explained that she could not substitute her judgment for that of the security officer and ordered removal of the leg restraints but not the arm restraints, and expressly informed defense counsel that if needed, extra time would be provided for attorney-client communication. *Id.* In *E.J.Y.,* the State conceded that the required showing on the record was not made, but the court held "this error does not require reversal unless it is shown that the use of restraints substantially affected the trial court's fact finding." *Id.* at 952. No such showing was made. Furthermore,

"[t]his was a proceeding without a jury, which greatly reduces the likelihood of prejudice. We conclude that the error was harmless." *Id.*

In this case trial counsel noted the fact that Zain was cuffed and requested the handcuffs be removed so he could take notes. The judge inquired with the Department of Corrections officer if he was comfortable removing the cuffs. The Officer responded that he could remove one hand. The judge asked if Zain was right or left handed and the Officer removed the cuff on Zain's right hand. RP 5-6. Although the *Hartzog* factors were not stated on the record, Zain has not shown that the use of restraints substantially affected "a jury's verdict" or the trial court's fact finding. *See State v. Hutchinson,* 135 Wn.2d 863, 887-888, 959 P.2d 1061 (1998). Because Zain's trial proceeded without a jury the likelihood of prejudice was greatly reduced and the error is harmless.

D. ZAIN'S COUNSEL WAS EFFECTIVE

Both the Federal and Washington State Constitutions provide the right to assistance of counsel. *See State v. Jury*, 19 Wn. App. 256, 262, 576 P.2d 1302, 1306 (1978); *see also* U.S. CONST. AMEND. VI, WASH. CONST. ART. 1, § 22. "[T]he substance of this guarantee is that courts must make 'effective' appointments of counsel." *Jury*, 19 Wn. App. at 262, 576 P.2d at 1306 quoting *Powell v. Alabama,* 287 U.S. 45, 53 S.Ct.

55, 77 L.Ed. 158 (1932). In *Strickland v. Washington,* the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Under *Strickland,* ineffective assistance is a two-pronged inquiry:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable."

State v. Grier, 171 Wn.2d 17, 33 246 P.3d 1260 (2011). (quoting *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052); *see also State v. Cienfuegos,* 144 Wn.2d 222, 226, 25 P.3d 1011 (2001) ("Washington has adopted the *Strickland* test to determine whether a defendant had constitutionally sufficient representation."). To satisfy the prejudice prong of the *Strickland* test, the defendant must establish that "there is a reasonable probability that, but for counsel's deficient performance, the outcome of

the proceedings would have been different." *State v. Kyllo,* 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052; *Thomas,* 109 Wn.2d at 226, 743 P.2d 816; *Garrett,* 124 Wn.2d at 519, 881 P.2d 185. In assessing prejudice, "a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law" and must "exclude the possibility of arbitrariness, whimsy, caprice, 'nullification' and the like." *Strickland,* 466 U.S. at 694–95, 104 S.Ct. 2052.

Ineffective assistance of counsel is a fact-based determination that is "generally not amenable to per se rules." *State v. Grier*, 171 Wn.2d at 33, citing *Cienfuegos,* 144 Wn.2d at 229, 25 P.3d 1011; *Strickland,* 466 U.S. at 696, 104 S.Ct. 2052 ("Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged."). Further, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's

perspective at the time." *State v. Grier*, 171 Wn.2d at 33 citing *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052.

In this case there has been no showing that the handcuffs effected the trial judge's ruling. Judges watch defendants enter the courtroom cuffed every day and there has been no showing that a judge seeing a defendant wearing a handcuff would influence their decision in any way. Second, there has been no showing counsel's performance was deficient, and that but for the deficiency, the outcome would have been different. In fact, all that can be gleaned from the record is that the Judge allowed Zain to write notes to assist in his defense. RP 5-6. Without a showing a deficiency, Zain's argument fails.

IV. CONCLUSION

For the above stated reasons, the conviction should be affirmed.

Respectfully submitted this 17 day of April, 2015.

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Prosecuting Attorney

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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on April 17th, 2015.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

April 17, 2015 - 2:39 PM

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